

EXHIBIT G

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

TSYS ACQUIRING SOLUTIONS,
LLC,
Claimant/Counterclaim Respondents

and

ELECTRONIC PAYMENT
SYSTEMS,
Respondent/Counterclaim Claimants

Case No. 76-103-Y-000038-07 VIAM

ROBERT J. CORCORAN, Arbitrator

ARBITRATOR'S FINDINGS, CONCLUSIONS, AND FINAL AWARD

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THIS MATTER came on before the Arbitrator for 10 days of hearings at the offices of the American Arbitration Association (AAA), Phoenix, Arizona, commencing on September 8, 2008 and concluding on September 19, 2008. The Claimant, TSYS Acquiring Solutions, LLC (TSYS), was represented by Jennifer Dubay, Esq. and Clete P. Samson, Esq., of the firm of Greenburg Traurig, Phoenix, Arizona. The Respondent and Counterclaimant Electronic Payment Systems, LLC (EPS), was represented by Scotty P. Krob, Esq., Greenwood Village, Colorado.

Disputes About Exhibits

1. The notice of Dispute dated August 15, 2008, is received in Evidence as Ex. R-12A.
2. Ex. R-72 is renumbered Ex. R-74, and is received in Evidence.
3. Ex. R-42 is renumbered Ex. 6, and is received in Evidence.
4. All of Ex. R-49, except the entries dated August 2006 and later are admitted in Evidence.
5. Respondent EPS' objections to Exhibits 265, 284, 308, 313, 366, 342, and 348, are sustained. References to these exhibits by the parties will be ignored.
6. EPS' objections to the tender of the Declaration of Denise Rollins and the attached Exhibit are sustained.

Based on the evidence and arguments presented, the Arbitrator finds, concludes and enters his Award as follows:

I. INTRODUCTION¹

This case involves two companies in the credit/debit card industry. EPS is an Independent Sales Organization/ Merchant Service Provider (ISO), who contacts merchants and enters into contracts for the merchants to accept credit and debit cards. TSYS is a processor, processing the front end (authorization) as well as the back end (settlement) of credit card transactions.

In 2005, EPS was using the processing services of CardSystems. During the summer of 2005, CardSystems was hacked into and several million credit card numbers were stolen. This incident was referred to throughout the arbitration as the CardSystems Security Breach. As a result of the Security Breach, Visa notified CardSystems it would no longer be authorized to process Visa credit or debit card transactions after October 31, 2005. As a result, EPS faced the daunting task of finding a new processor and moving its 22,000 merchants from CardSystems to the new processor in a very short period of time.

TSYS (who was doing business as Vital at the time) was a competitor of CardSystems and viewed the Security Breach as an opportunity to obtain some of the processing business CardSystems had been providing. EPS was one of the largest ISOs processing with CardSystems. TSYS wanted to obtain the EPS account. Within a short time after the public announcement of the Security Breach, Anderson, the senior vice president of sales and marketing for TSYS, contacted the president and part owner of EPS, Dorsey, and suggested that TSYS might be able to help EPS by TSYS replacing CardSystems as EPS' processor. The parties agreed to discuss an agreement. The negotiations for the agreement involved primarily Dorsey on behalf of EPS, though the other owner of EPS, McCann, was involved to a lesser degree. On TSYS' side, the negotiations were handled primarily by Anderson, and to a lesser extent, Lawless, the director of

¹ The citation "Jones, Tr. xxx/y - z" means testimony by witness Jones at page xxx, lines y through z, contained in the Reporters Transcript of Proceedings totaling 2,724 pages. "Exhibit" refers to an exhibit in Claimant's exhibit books; "Exhibit R" refers to an exhibit in Respondent's exhibit books

business development at TSYS. The four negotiators testified during the hearing. Although there was some dispute as to the negotiation discussions, it is undisputed that the parties reached an agreement and at least part of the agreement was reduced to writing. The Processing Services Agreement dated August 1, 2005, is Ex. 9 (the Agreement). The Agreement was prepared solely by TSYS, with no input into drafting by EPS. The Agreement between EPS and TSYS was signed in August 2005.

Section 3.1 of the Agreement (Ex. 9) provides that the fees for services provided to EPS will be "the fees for such services provided to Merrick pursuant to the Merrick Agreement." The Merrick Agreement (Ex. 3) refers to an agreement between Merrick Bank and TSYS entered into in August 2004, approximately one year before the written agreement between TSYS and EPS. The Merrick Agreement describes services TSYS provides to Merrick. The prices for such services are set forth in Exhibit A of the Merrick Agreement, and were referred to in the arbitration as "Merrick Pricing." (Ex. 3, Ex. A at TSYS AAA 00166) EPS was not a party to the Merrick Agreement or the negotiating of the Merrick Agreement. Neither the Merrick Agreement nor Merrick Pricing were attached to the written agreement between TSYS and EPS, nor provided to EPS by TSYS before the written agreement between TSYS and EPS was signed.

In addition to the written Agreement between EPS and TSYS, the parties also reached several verbal agreements, including, (1) that the ACH provisions of the written Agreement, Section 3.1.2, would not take effect immediately. There was testimony that indicates that TSYS would bill EPS for 3 months before an ACH billing, that nothing would come out of the ACH account until Dorsey was comfortable with the billings by TSYS, or that EPS would provide an ACH account after 3 months of correct bills. (2) that the provisions of Section 2.1 purporting to require EPS to use TSYS as its preferred processor would not apply to a substantial number of merchants, which ended up including some merchants who would continue to process on the CardSystems system, and (3) that TSYS

would provide a toll free, 1-800 number to EPS to enable EPS, among other things, to move their merchants to another processor if EPS so chose.

TSYS argued that the agreement of the parties is limited solely to the written Agreement, pointing to Ex. 9, Section 9.14 which contains integration language and provides that amendments be in writing and signed by both parties. Under Arizona law, the Arbitrator's consideration of parol evidence modifying the written agreement is proper because the written Agreement was not an integrated Agreement and the written Agreement is ambiguous. This is particularly true since it relates to the issue of services and the pricing for such services.

The presence of an integration or merger clause, does not necessarily mean the contract is fully integrated. To determine the integration issue, the Arbitrator is required to examine all relevant evidence, including evidence of prior negotiations.

The absence of the Merrick Pricing from the written agreement supports the conclusion that the written agreement was not fully integrated, particularly as to services and pricing issues. The language of the written agreement is "reasonably susceptible" to the interpretation asserted by EPS regarding pricing. Accordingly, it is appropriate for the Arbitrator to consider evidence of the parties' negotiations to provide guidance as to the parties' intended meaning. Based on such considerations, the Arbitrator concludes that the written agreement was not a fully integrated agreement, including but not limited to its provisions relating to services, pricing per transaction, EPS' obligation to provide an ACH account, whether EPS could place merchants with processors other than TSYS, and TSYS obligation to provide EPS a toll free telephone number. The agreement between EPS and TSYS included the written Agreement (Ex. 9), as well as these oral agreements. In addition, it should be kept in mind that the preclusion of parol evidence applies only to agreements entered into before or at the same time as the written documents. It does not preclude evidence of discussions between the parties after the agreement is signed as to how it is to be interpreted or applied.

Parol evidence can also be admitted to assist in the interpretation of the written contract.

With their agreements in place, the parties moved forward with the process of converting EPS' merchants from the CardSystems to the TSYS platform. The conversion process was fraught with difficulties. There was a substantial dispute in the testimony as to who was at fault for the difficulties. Testimony was presented, and not refuted, that after TSYS sent out a letter to the initial group of merchants to be converted, directing them to call a toll free number to facilitate the conversion, TSYS' phone service provider failed to activate the number. Problems were also experienced in connection with the charges for mailing the letters, which resulted in substantial frustration by EPS, as well as Merrick Bank, that the conversion by TSYS was not proceeding in the "seamless" manner TSYS had represented. EPS hired additional personnel and spent substantial sums to assist with the conversion. A bill sent by TSYS and electronically charged to EPS through the ACH process in the amount of \$72,304.80 was withdrawn due to the problems with the conversion. (See Ex. 52) Dorsey's frustration with the conversion reached the point where he asked at one point whether EPS could stop the conversion process and go back to CardSystems. Skinner, TSYS' conversions analyst informed Dorsey that it was too late to do so. TSYS argues that many of the problems experienced in connection with the conversion were the result of the failure of EPS personnel to be available for or fully participate in training TSYS attempted to provide. Much of the training scheduling problems resulted from EPS' need to continue running its business, with a limited number of employees, and during a very hectic time for its business as a result of the Security Breach and the failure of CardSystems. Even if EPS personnel had been able to attend more training, such attendance would not have alleviated many of the problems suffered in the conversion. For example, TSYS acknowledged that it did not have a document addressing the various types of rejects that EPS would need to "work." This resulted in EPS not being able to work a substantial number of outgoing

rejects and eventually in EPS developing its own reference guides, such as the outgoing reject reference guide (Ex. R-53), prepared by St. Romaine and Maley.

The difficulties experienced in the conversion are reflected in the fact that TSYS makes no claim in this arbitration proceeding for compensation for the work it performed in accomplishing the conversion. As a result, the Arbitrator need not make a determination as to who was at fault for problems experienced in the course of the conversion. Whatever else may be true about the conversion, it is clear that by the time it was concluded, EPS had no desire to have TSYS personnel provide any type of Help Desk or technical support to any of its merchants, and wanted to handle all of its merchant relations directly through EPS' own customer service center.

II. TSYS'S CLAIM: CHARGES DISPUTED BY EPS FOR SERVICES PROVIDED BY TSYS

The conversion of EPS' merchants from CardSystems to TSYS was accomplished on or about April 1, 2006. Since then, under the parties' agreement, TSYS has provided processing services to EPS and has charged EPS for multiple services. Beginning with the first bill sent by TSYS after the conversion for services rendered in April 2006, and continuing through the hearing, EPS has disputed some of those charges, including the charges relating to per transaction fees, Help Desk charges, charges for providing monthly merchant statement files, and charges associated with data disks provided to EPS. (Exhibit 261, Notice of Dispute letter for April 2006 charges; Exhibit R-12 and R-12A Collection of dispute letters and copies of checks paid). In some instances EPS has disputed charges and refrained from paying the disputed amounts until the dispute is resolved, as EPS is entitled to do under Section 3.2 of the Agreement. In other instances, to avoid interruption in the services TSYS provides, EPS has paid some charges, even though it disputes the charges. TSYS claim in this case is for the charges EPS has disputed.

A. Per transaction fees

Both parties presented substantial testimony about the agreement reached primarily between Dorsey and Anderson as to the per transaction fee that TSYS would charge EPS. Anderson and Lawless acknowledged that Dorsey asked for special pricing due to the size of EPS' merchant portfolio. Anderson and Lawless testified that TSYS was prohibited by the Merrick Agreement and by discussions with Merrick Bank officials from offering EPS anything other than the per transaction costs in Merrick Pricing. Reviewing the contents of the Merrick Agreement (Ex. 3), there is nothing in the document that prohibits TSYS from granting different pricing to EPS in its agreement with TSYS. Anderson acknowledged there is no such prohibition in the document. E-mails from Merrick Bank officials confirmed that Merrick Bank had not and never intended to limit TSYS' ability to grant special pricing to EPS. Among the 29 or so amendments to the Merrick Agreement, the 21st amendment does exactly what Anderson said TSYS could not do. It agrees to grant special pricing to another Merrick Bank ISO, Vision Bankcard. (Exhibit 361) The new price, characterized as "Major Merchant Pricing" is granted only to Vision Bankcard and is substantially lower (.03 cents) than what Anderson testified he was able to offer EPS (.045 to .047cents).

An issue before the Arbitrator, is, what was the intent of the parties with regard to pricing? Dorsey and McCann testified that they asked for 4.5 cent pricing and whether it was under the Merrick Pricing, or otherwise, Anderson and Lawless agreed the pricing EPS would receive would be 4.5 cents. Anderson and Lawless testified the pricing was to be the Merrick Pricing. However, they acknowledged that they represented to Dorsey that the Merrick Pricing would result in a price of between 4.5 and 4.7 cents. The written Agreement between the parties does not indicate a specific rate, but merely states in Section 3.1 that the

pricing will be the fees for such services provided to Merrick pursuant to the Merrick Agreement. (Ex. 9, Section 3.1)

The dispute as to this issue could have been avoided had the applicable pricing either been expressly stated in the Agreement, or at a minimum, the applicable pricing schedule attached. TSYS had primary control over both of these matters. TSYS was the sole drafter of the Agreement and therefore the lack of clarity in the document lies primarily with TSYS. Likewise, it is undisputed that TSYS had the Merrick Pricing in its possession, but failed to attach it to the Agreement. TSYS provided conflicting explanations for its failure to attach the pricing schedule. Initially, Anderson testified he did not attach it because he thought Dorsey had it. Even if Dorsey did have it, it still would have been prudent for TSYS as the drafter of the document to attach it. Later TSYS asserted that it was confidential. Yet according to Finley, an executive account manager at TSYS, TSYS freely distributed the pricing schedule to more than 50 participants in an overview meeting with representatives of the Merrick Bank ISOs, with no mention and no apparent concern for such confidentiality.

Pricing schedules in previous agreements between EPS and processors were typically a few pages. The CardSystems contract expressly included a pricing schedule that was only 4 pages long. (See Ex. 2, Schedule A) Merrick Pricing is an involved 26-page Merrick Pricing schedule. (Ex. 3, Ex. A) It is a schedule negotiated and drafted by TSYS of the prices TSYS charges for the services TSYS provides to Merrick Bank and its ISOs. Despite TSYS having authored the pricing schedule, more than one TSYS representative had difficulty pointing to which section of the pricing schedule applied to a particular service. See discussion of Help Desk fees and merchant statement file charges, below. Sometimes, different TSYS representatives differed as to which sections should apply. The convoluted nature of the pricing schedule, as well as the failure of TSYS to provide it to EPS at the outset and clearly define the services to be

provided and the charges for those services, contributed in no small part to the controversies involved in this case.

Under these circumstances, the Arbitrator finds ambiguity as to the services TYSY was to provide and the charges EPS was to pay for those services. The fault for the ambiguity lies with TSYs as the drafter of the documents and the proponent of the Merrick Pricing. Accordingly, the Agreement will be interpreted against TSYs and in favor of EPS. Based on the evidence presented the Arbitrator finds and concludes that the parties agreed upon a price of 4.5 cents per transaction.

Having billed EPS for its services, and EPS having properly disputed those charges, TSYs stands in the position of a claimant asserting a breach of contract claim. As such, the burden lies with TSYs to establish that the services it provided were the services the parties agreed to and that the amounts charged by TSYs were the agreed upon amounts. Throughout much of this arbitration, TSYs failed to meet this burden, apparently assuming that if they billed it, they were entitled to receive it - a belief for which TSYs provided no support.

With regard to transaction costs, TSYs provided no evidence as to the rate EPS was actually charged nor the justification for that charge. Although there is a pricing grid contained in the Merrick Pricing (Ex. 3, Exhibit A), according to Anderson, that grid is based on the aggregate volume of transactions by all Merrick Bank ISOs combined. TSYs failed to present evidence as to this combined volume and hence no basis for the per transaction rate it charged EPS. Having failed in this regard, the Arbitrator finds there is no basis to assess EPS a per transaction charge other than the 4.5 cent rate testified to by EPS.

The differences between the amount EPS was charged for transaction fees and the rate of 4.5 cents per transaction are shown on Ex. R-14. Between April 2006 and June 2008, this difference amounted to \$172,261.12 disputed by EPS, plus an additional \$24,465.16 paid by EPS under protest. The Arbitrator finds that TSYs over billed EPS in the amount of \$196,726.28 for per transaction fees and

sustains EPS' dispute in that same amount. EPS is entitled to a refund of the \$24,465.16 it paid under protest for transaction fees and owes no further amounts for transaction fees billed through the date of the arbitration.

B. Help Desk fees

One of the central disputes in this case involved the nature of customer support for merchants, sometimes known as Help Desk services, TSYS was to provide and the charges that were to be assessed to EPS for those services. Historically, EPS has provided and continues to provide its own 24/7 Help Desk service to its merchants. During their negotiations, Anderson and Lawless represented to Dorsey and McCann that TSYS could provide Help Desk services as an option at an additional charge. Anderson testified that TSYS provided "a menu of services" from which clients can pick and choose what services they want, including the level of Help Desk service. A client can choose some, all, or parts of the slate. An ISO can select the level of Help Desk support they want, as if from a menu. Lawless testified to the same effect, that TSYS services, including Help Desk services, were a la carte. The options offered by TSYS' representatives included 24/7 coverage or after hours coverage.

According to TSYS, under the Merrick pricing there are two separate charges associated with Help Desk services. There is a per call charge assessed each time one of EPS' merchants calls. The amount of the per call charge varies depending on the time of day the merchant calls. In addition, TSYS assesses a "residency fee" in connection with providing Help Desk services. The vast majority of what EPS was charged by TSYS for Help Desk services was not the per call charge, but rather the residency fee. According to TSYS, the residency fee is assessed in order to place information on the Help Desk system that will enable TSYS to assist merchants when they call in. The residency fee is assessed on a per merchant basis, each month, for each merchant in EPS' portfolio, regardless of how many merchants actually call in to TSYS for assistance.

While EPS was processing with CardSystems, Dorsey and McCann testified that EPS paid a residency fee of 50 cents per merchant per month. The residency fee charged by CardSystems was for simply being resident on their system and being able to process transactions. There was no separate residency fee for Help Desk services. Dorsey characterized residency fees as a fee for doing nothing, as they are assessed whether the merchant uses the system or not. It is simply a charge for being there. McCann testified that residency fees "are just fluff" in that they do not really do anything. As a result, Dorsey and McCann insisted that EPS not pay a residency fee and they further testified that Anderson agreed no residency fee would be charged. Anderson disputed that testimony.

The Agreement between the parties provides, in Section 1.1.5, that TSYS will provide "after hours call center support directly to EPS." The Agreement does not indicate the charges that will be assessed for such service, other than the general reference in Section 3.1 to fees charged under Merrick Pricing. The Agreement makes no mention of a residency fee required in order to obtain Help Desk services, nor the amount of such fee. (Ex. 9, Section 1.1.5) Anderson acknowledged that the selection of after hours service by EPS in the Agreement was not permanent, but was just to clarify what EPS wanted, though they could alter the type of Help Desk support pursuant to Merrick pricing, if they desired. Lawless' recollection was that EPS elected not to have any Help Desk services from TSYS from the outset, as EPS was already providing its own.

EPS' efforts to determine what EPS was being charged for Help Desk services and why, was a source of consternation. Even after Merrick Pricing was supplied to EPS after this arbitration was initiated, determining the applicable per call and residency fee was difficult for EPS' representatives. Initially, Maley determined that if EPS was bound by Merrick Pricing schedule, then Section 10.3 was the most applicable, as it seemed to be the only section in the pricing schedule that referenced ISOs and Help Desk services. The fee under Section 10.3 is

indicated by reference to Section 10.4.4.1, which provides a \$10 per call fee and no residency fee.

Difficulties in determining the applicable fee were not limited to EPS representatives. Maxwell, TSYS Executive Account Manager of EPS' account, had difficulty ascertaining which residency fee would apply to EPS, concluding at one point it would be Section 8.2 of the Merrick Pricing schedule. Lawless, who, on behalf of TSYS, helped negotiate the Agreement with EPS, had similar difficulties in ascertaining which residency fee should apply to EPS. TSYS failed to provide any witness or exhibit that explained clearly and definitively which per call fee and which residency fee, if any, applied to EPS and why. It is TSYS' burden to establish the level of Help Desk services contracted for and that the price TSYS seeks is the price agreed to between the parties. TSYS failed to meet its burden as to either of these elements. TSYS failed to establish its claim for Help Desk services

The testimony provided by TSYS' representatives was equally conflicting regarding the ability of EPS to cancel Help Desk service. Contrary to his initial a la carte testimony, Anderson later testified that EPS could not terminate Help Desk services provided by TSYS. No matter why they called or how they got the phone number, if an EPS merchant called TSYS' Help Desk number, EPS would be charged for the call. This also triggered the assessment of a Help Desk residency fee not only for the calling merchant, but for the thousands of merchants in EPS' portfolio. According to Anderson, the only way EPS could avoid being charged a per call fee, was for EPS to notify the merchant before the merchant calls that the merchant should not call TSYS for Help Desk support. The Arbitrator does not believe such foresight should be required of EPS. According to Anderson, as long as they get a call from a merchant they are entitled to the per call fee. However, Anderson acknowledged that TSYS has the ability to set scripts for those answering phones and to not charge for calls. In fact, TSYS already does not charge for many of what it characterized as "non-supported

calls," which are calls for which TSYS cannot provide an answer and the merchant is directed elsewhere. According to Anderson, TSYS can decide when it will or will not charge for a merchant call, generally not charging for ones in which TSYS could not provide the needed service. TSYS provided no reason why it could not simply treat calls from EPS merchants as non-supported calls and tell the merchant to contact EPS' help support number.

Maxwell testified that even if EPS wanted no Help Desk services, TSYS would still charge the residency fee because there is only one residency fee and that is for the TID (terminal identification number) which enables the merchant to process a transaction on the TSYS system. However, Anderson testified that the residency fee for Help Desk service was separate from and in addition to the residency fee charged for the TID that enables a merchant to process transactions through TSYS. Both Anderson and Maxwell were contradicted by the TSYS representative who was the most informed about TSYS' Help Desk services, Mr. Sahs. Sahs is the senior vice president of managed services for TSYS and is responsible for servicing operations, including Help Desk Services, for all of North America. According to Sahs, EPS should be able to cancel Help Desk services at any time, or change it from one level of support to another. One option testified to by Sahs was to have a "stage only file" on the TSYS system, which allows the merchants to process transactions, but provides no support from TSYS. This would appear to be what EPS was seeking all along and, according to Sahs, the residency fee for stage only service would be reduced from its current level of 75 cents to 7.5 cents per merchant. To the extent the parties contemplated payment of any residency fee by EPS, this 7.5 cents represents the maximum amount of fee that should have been charged.

Although the evidence regarding the initial level of Help Desk support requested by EPS was in dispute, it was undisputed that by the time the conversion was completed, EPS did not want TSYS to provide Help Desk services to its merchants. EPS made several efforts, verbally and in writing to cancel Help Desk

services. Maley repeatedly included written requests to cancel Help Desk services in the Notices of Dispute sent to TSYS. TSYS refused and continued billing EPS for the unwanted service.

Ironically, in a letter dated July 14, 2006 (Ex. 275), TSYS' counsel, Goldwin, threatened what he later testified TSYS could not do and precisely what EPS continually asked TSYS to do - to not provide Help Desk services to EPS merchants, to tell the merchants to call EPS if they needed help, and not to charge EPS for doing so. In his letter, Goldwin attempted to infringe on EPS' right to dispute charges and not to have to pay those charges until the dispute was resolved. Goldwin threatened that if EPS did not immediately pay the full outstanding balance, "TSYS will no longer support EPS merchant Help Desk calls. All EPS merchant Help Desk calls will be routed to a voice message that states the caller should contact EPS directly. Any such calls will be non-billable." (Exhibit 275). Clearly TSYS could have done what EPS requested, but chose not to.

Based on the evidence presented, the Arbitrator concludes the original agreement of the parties was that EPS would receive after hours service. Based on the representations of TSYS' representatives, EPS was entitled to cancel the a la carte Help Desk service it had elected at any time. In light of events that transpired during the conversion, by the time of the "go live" date on April 1, 2006, EPS no longer desired those services and provided its own 24/7 Help Desk services. EPS reiterated its desire to stop receiving any Help Desk services from TSYS on several occasions, verbally and in writing. As a result, TSYS should have made the global update testified to by Sahs and eliminated all charges to EPS for Help Desk services. During one brief period of time as a result of unusual events, EPS requested and TSYS provided Help Desk services. EPS paid for and does not dispute the charges associated with those unusual services. Those unusual circumstances were problems related to the conversion, including but not limited to about 800 merchants that were not properly converted so EPS had to build new

accounts. There was a failure of TSYS to enable merchants to take American Express and Discover cards following the conversion. At all times other than that one unusual period, TSYS could have provided a script that would have resulted in no charge calls whenever an EPS merchant called TSYS for Help Desk support, merely advising the merchant to call EPS and providing the number for doing so. TSYS' failure to institute such a no call script constituted a failure to mitigate any damages it might otherwise claim for having to continue to answer calls from EPS merchants.

The Arbitrator further finds TSYS failed to disclose the separate residency fees associated with various levels of Help Desk services and failed to establish any agreement by EPS to pay residency fees associated with Help Desk services.

The fees TSYS seeks to charge EPS for Help Desk support, including the residency fees, as well as the per call fees, are summarized in Ex. R-14. From April 2006 through June 2008, TSYS has billed EPS \$497,342.5, of which EPS paid the March 2008 amount of \$16,325.00 and the May 2008 amount of \$16,111.50 under protest.

The Arbitrator finds that EPS' dispute of the Help Desk charges are valid and that TSYS failed to show that they are entitled to the fees billed for such services, including the per call charges and the residency fees. Accordingly, the Arbitrator finds that TSYS is not entitled to the \$497,342.53 it has billed EPS for Help Desk services through June 2008, nor any amounts billed for Help Desk services, including residency fees, after June 2008. EPS is entitled to a refund from TSYS in the amount of \$32,436.20 for the March and May 2008 bills paid under protest for Help Desk services.

The Arbitrator further directs TSYS to draft a script (subject to review and approval by EPS), to be given in response to any future calls received by TSYS from EPS merchants. The script shall advise the merchant to contact EPS directly and provide the telephone number for doing so. Such calls shall be deemed no

charge calls, as has been the case in the past when TSYS was unable to provide support.

C. Merchant statement file charges

Most of the ISOs serviced by TSYS rely on TSYS to generate and send monthly statements to the ISO's merchants. TSYS charges fees for generating the information, stuffing the envelopes, and mailing the statements. EPS, however, prefers to bill its own merchants, rather than having the processor do so. Dorsey explained this practice of EPS and showed Anderson the equipment used to generate such monthly merchant statements, during one of Anderson's early visits to EPS' offices. Although Anderson encouraged EPS to use TSYS' billing services, he understood that EPS would not do so and would need the information necessary to continue its practice of doing its own monthly merchant billing.

In order to generate and send statements to its merchants, EPS needs and has historically obtained from its processor a merchant statement file. This file provides information regarding transactions by EPS' merchants for the previous month. During the time EPS used CardSystems for processing services, EPS paid CardSystems \$300 per month for the file it needed to prepare its monthly merchant statements. However, Dorsey felt that was an unduly high charge to provide information the processor already possessed. According to Dorsey, in response to this concern and in an effort to convince EPS to go with TSYS, Anderson agreed to include the monthly merchant file as part of the services being provided to EPS at no additional charge. McCann confirmed that EPS' understanding of the agreement regarding monthly merchant statement files was that it would be provided at no additional charge.

Section 1.1.2.3 of the written Agreement confirms TSYS' obligation to provide EPS a "Monthly Merchant Information File." (Ex. 9) The written agreement provides no further description of the file that is to be provided and does not contain pricing detailing any charge for providing the file. The absence

of any reference to a charge for the monthly merchant file is consistent with Dorsey and McCann's testimony that there was to be no such charge.

According to TSYS, the file that is provided to EPS to satisfy its obligation under Section 1.1.2.3 of the Agreement is the Enhanced Merchant Statement Basic file. TSYS argued that the charge for the file is covered by Section 3.1 of the Agreement, which indicates the fee charged for all services will be the fee indicated in Merrick Pricing. The difficulty with TSYS' position is that the Merrick Pricing does not list the Enhanced Merchant Statement File, nor indicate a charge for it. (See Ex. 3, Ex. A). Nonetheless, TSYS has consistently invoiced EPS for the Enhanced Merchant Statement Basic file each month from the outset of the relationship. The charges for the file range from \$3,959 (Ex. R-14, June 2008) to \$5,742.00 per month (Ex. R-14, June 2006) and are summarized on Ex. R- 14.

From the first invoice received by EPS, EPS disputed the charges for the monthly statement file, reiterating Dorsey's understanding that these files were to be provided without charge. (Ex. 261) In October, 2007 TSYS' in house counsel, Goldwin, notified EPS that TSYS would withhold the monthly statement file from EPS unless EPS paid the full amount TSYS charged for the file. (Ex. R-17, October 26, 2007 letter from Goldwin) This action violated the dispute resolution mechanism provided in the Agreement, which allows a party to dispute any charges and withhold payment until the dispute is resolved, but require both parties to continue to perform their obligations under the Agreement while the dispute is pending. (Ex. 9, Section 9.6) Having no choice but to pay the full amount charged by TSYS in order to obtain the monthly merchant file needed to generate its monthly statements to its merchants, EPS did so from August, 2007 through the present. EPS noted that such payments were made in dispute. (See Ex. R-14, Aug-07 through Jun-08)

In addition to the monthly charge for the Enhanced Merchant Statement Basic file, the invoices from TSYS to EPS contained a second charge, in the

amount of an additional \$2,250 per month. The charge is identified in the invoices as XML Statement file. When asked about this second charge, Anderson testified he was unaware of it and was unable to say what it was for. Maxwell testified that the charge for the Enhanced Merchant Statement Basic file was the charge to accumulate the data, while the XML Statement file was the charge to send the accumulated data to EPS. As with the Enhanced Merchant Statement Basic file, the Merrick Pricing is devoid of any reference to what the XML Statement file is or the charge for providing it. (Ex. 9)

Marshall is the individual at EPS responsible for receiving the Enhanced Merchant Statement Basic file and generating EPS' statements to its merchants each month based on the information in that file. Marshall testified that the contents of what EPS received from CardSystems for \$300 per month is comparable to what TSYS seeks to charge EPS more than \$6,000 per month.

A series of letters from TSYS' counsel, Mr. Goldwin, provides a demonstration of what transpired with the Enhanced Merchant Basic and XML Statement files. After EPS questioned the charges for the Enhanced Merchant Basic file, Goldwin sent EPS a response on July 14, 2006. (Ex. 275) In his letter, Goldwin tells EPS the Enhanced Merchant Basic file is provided for in the Agreement, but fails to indicate the section of the Pricing Schedule that supports the charge. Goldwin also failed to mention the XML Statement charge TSYS later indicated was required in order to send the Enhanced Merchant Statement Basic file. A few months later, Goldwin sent EPS another letter, dated December 11, 2006 (Ex. 324), reiterating what the Enhanced Merchant Statement file is for, but again failing to disclose the XML statement charge. Finally, in his letter dated January 5, 2007 (Ex. 334) Goldwin acknowledges that the Enhanced Merchant Statement Basic file and the associated charges were not part of the original Merrick Pricing or any amendment that was in effect at the time EPS and TSYS entered into their Agreement in August 2005. Goldwin acknowledges that these matters appear in the 11th amendment to the Merrick Agreement. The 11th

Amendment is dated April 12, 2006, well after TSYS and EPS had made their agreement. (See Ex. 162)

Goldwin's letters reveal that he was under the erroneous impression that the Merrick Pricing schedule was attached to and provided as part of the written Agreement between EPS and TSYS from the time it was signed in August 2005. His letters also disclose that Goldwin was under the misimpression that as the Amendments to the Merrick Agreement were approved by Merrick Bank and TSYS, copies were provided to EPS. In his January 5, 2007 letter Goldwin refers to the pricing schedule attached to the Agreement. Although Goldwin apparently recognized that Merrick Pricing should have been attached to the written Agreement, all parties involved in the actual negotiation and signing of the Agreement acknowledge that did not happen. In that same January 5, 2007 letter Goldwin accuses EPS of failing to take into account the 11th Amendment, reflecting his impression that it had previously been provided to EPS. The undisputed testimony of Dorsey for EPS, and Anderson for TSYS is that Merrick Pricing was not attached or provided to EPS when the Agreement was signed in 2005 and there was no evidence that any of the Amendments were provided to EPS at the time it signed the Agreement or at any time before this arbitration was initiated. EPS is not obligated to pay for something about which it was not informed and pursuant to a pricing Amendment that EPS consent to and that did not exist at the time EPS entered into the Agreement with TSYS.

Under the facts presented, the Arbitrator finds that EPS had no way of knowing and could not reasonably expect that it would have to pay \$6,000 or more each month in order to receive the same information for which it had previously paid \$300. At a minimum, TSYS should have disclosed these charges to EPS and made sure EPS understood and agreed to pay them, particularly since Anderson had received copies of EPS' invoices from CardSystems reflecting the \$300 per month charge EPS historically paid. Instead, TSYS did not disclose the charges and when asked, were unable to identify the applicable charges or explain what

they were for, much less why they would cost twenty fold what EPS had been paying.

As with the preceding TSYS claims, TSYS failed to establish what EPS was to pay for the monthly merchant statement files it received from TSYS. Accordingly, TSYS has provided no basis for the Arbitrator to ascertain the price the parties mutually agreed would be paid for the monthly merchant files, other than EPS' testimony that there was no additional charge. This outcome is consistent with the absence of any pricing for the Enhanced Merchant Statement Basic file or the XML Statement file in the documents that existed when the parties entered into their Agreement.

The Arbitrator finds that EPS' dispute of the monthly statement merchant file charges are valid and that TSYS has failed to show that they are entitled to the fees charged for the merchant statement files, including the Enhanced Merchant Statement Basic file, as well as The XML Statement file.

Based on the calculations set forth on Exhibit R-14, the Arbitrator further finds and concludes that TSYS is not entitled to the \$127,014.50 billed to EPS for the Enhanced Merchant Statement Basic file from May 2006 through June 2008. EPS is entitled to a refund from TSYS in the amount of \$42,884.75, representing the portion of this sum EPS paid under protest through June 2008. In addition, EPS is entitled to a refund of all sums paid for the Enhanced Merchant Statement Basic file from July 2008 through the date of this award. This amount may be claimed by affidavit to be submitted by EPS within 30 days, subject to objection by TSYS as to amount only.

The Arbitrator further finds that TSYS has failed to establish that it is entitled to be paid the fees billed for the XML Statement file in the amount of \$2,250 per month. From April 2006 through June 2008, such charges amount to \$60,750. Consistent with this ruling, TSYS shall not charge EPS for the XML Statement file from June 2006 forward.

In moving forward after the entry of this award, TSYS shall continue to provide the Enhanced Merchant Statement Basic file to EPS in the same format and time as it has in the past.

D. CD data disk charges

One of the services offered by TSYS to ISOs such as EPS, is reports and files on CDs. TSYS assesses a charge for each page of data stored on the disk. Section 15.1.1 of the original Merrick Pricing schedule provided a rate of .0036 cents per page. (Ex. 3, Ex. A, Section 15.1, page TSYSAAA00183) For the first 5 months of the parties' relationship, TSYS charged EPS at the .0036 cent rate. (Ex. R-31, July through November 2006). Then, beginning in December 2006, without explanation, TSYS began applying a rate of .00563 cents per page. (Ex. R-31, December 2006 through June 2008) No evidence was presented that TSYS provided EPS any notice of or explanation for this change prior to making it.

Maley testified that he asked Poole, the Client Operations Manager assigned by TSYS to handle EPS, for an explanation of the change, but received no answer. The issue was raised to TSYS' in-house counsel. Mr. Goldwin indicated that the higher rate should have been charged all along. At the hearing, TSYS' counsel offered a different explanation, arguing that the different rates applied depending on whether the information provided to EPS was POS authorization reporting or CD Rom reports. However, no evidence was provided to indicate that the reports and information EPS requested on CDs ever changed. Maley confirmed that the things EPS was getting on CDs never changed. Only the price changed.

Based on the evidence presented, the Arbitrator concludes that .0036 cents per page provided for in Section 15.1 of Merrick Pricing was the proper rate charged to EPS at the outset of the relationship, that TSYS provided no basis for changing the rate and that therefore the appropriate rate for all information provided to EPS on CDs is .0036 cents per page. Based on the calculations set forth on Exhibit R-31, the Arbitrator further finds and concludes that TSYS over

billed EPS for the CDs between December 2006 and June 2008 in the amount of \$30,595.10 and sustains EPS's dispute in that same amount.

Several of the fees charged by TSYS to EPS do not appear on the bills sent by TSYS. They were billed indirectly through Merrick Bank to EPS. (See Ex. R-27) This practice by TSYS of billing EPS outside the contract may have had the effect of preventing EPS from invoking the dispute resolution process. However, the Arbitrator need not resolve this issue, as EPS was not able to quantify the amount of damages it may have suffered as a result of this billing practice by TSYS.

III. EPS' COUNTERCLAIMS

In addition to disputing fees charged to it by TSYS, EPS also asserted affirmative counterclaims, seeking reimbursement for fines caused by TSYS and damages from TSYS for various actions by TSYS.

A. VMPD fines

EPS asserts a counterclaim against TSYS for fines imposed by Visa against EPS as a result of TSYS' failure to comply with the requirements of Visa's VMPD program. The central witness who testified about the VMPD program and the fines imposed against EPS in connection with it was Roger Klems. Klems was the only witness presented during this two week hearing who was not affiliated with either party. He works for Merrick Bank, and in that capacity deals with TSYS and EPS. According to Klems, the VMPD is a program developed by Visa to track purchases made using corporate Visa cards for purposes of reporting such purchases on 1099 income tax forms. The VMPD program requires entry of address information relating to a merchant in a very specific form. For several years, predating its relationship with EPS, and more than 10 years overall, TSYS has had difficulty properly entering the VMPD information in the form and format required by Visa. Klems discussed the problem with various representatives of TSYS over those years.

Initially, EPS did not realize it had a VMPD problem. The bills EPS was receiving merely noted a "registration fee." Klems was not sure why they are identified in this manner. During the course of a conversation Maley had with Klems on an unrelated matter, Maley mentioned the problem EPS was experiencing with the registration fee. Klems offered his assistance to address the problem, obtaining records from Visa that indicated of the 2,003 problem incidents identified by Visa as being associated with TSYS, 1,983 were this VMPD address problem TSYS had failed to address for years. In July 2007, Klems notified Poole, the Client Operations Manager assigned by TSYS to handle EPS. Klems reminded Poole this was the same problem Klems had discussed with Poole and other TSYS representatives for years previously and Klems indicated it needed to be remedied by TSYS. It made no sense to Klems that the problem had not been remedied previously, as it had been going on for 10 years and, according to Klems, TSYS should have been able to programmatically fix it in about 10 minutes. Klems then got Visa involved and, during a conference call among Klems, Visa and TSYS, Visa informed TSYS that 90% of the errors with TSYS' clients were this VMPD address issue.

At the same time Klems was working with TSYS to solve the problem from a system wide standpoint, he also instructed EPS how to go into certain screens and fix it on an individual, merchant by merchant basis. St. Romaine undertook the process of making individual corrections. However, Poole instructed her to stop those efforts, as TSYS was going to fix them on a global, system-wide basis. However, TSYS' initial global fix of the VMPD problem apparently failed, as EPS continued to receive additional fines. A second attempt by TSYS at a global solution succeeded and the problem was solved in February 2008. (Ex. R-39)

TSYS argued the fines were not their fault for several reasons, none of which are persuasive. First TSYS argued the fines were being sent to CardSystems, EPS' predecessor processor, rather than to TSYS. However, TSYS provided no evidentiary support for this argument and it is refuted by the fact that

notices sent to CardSystems would not have been received by EPS, since EPS was no longer processing with CardSystems. As testified to by Maley, the charges for "registration fees" appeared as a pass through from Visa on the bills received from TSYS. As pointed out by Klems, at the time this matter was brought to his attention, TSYS had 900 error reports on its screens, which it would not have had if the error reports were going to CardSystems. At most, Klems concluded that the reports were erroneously sent to CardSystems for one month, which was why Visa gave EPS an \$18,000 one month credit toward the fines, but did not relieve the remainder of the fines.

Next TSYS argued that the problems were EPS' to fix. Again the Arbitrator is not persuaded. The problems were created by TSYS improperly inserting address information and its long standing policy of ignoring the problem. EPS could not reasonably have known that "registration fees" were VMPD fines, so EPS did not know what to fix for a substantial period of time. EPS was attempting to work with Merrick Bank to find out what the registration fees pertained to. Once EPS was informed as to what the problem was, it promptly commenced doing what it could to minimize the fines. But then TSYS told EPS to stop trying to fix them individually.

When all was said and done, Klems concluded that TSYS was responsible for mapping the information over from the CardSystems platform to the TSYS platform in a manner that complied with VMPD requirements and would avoid such fines, but, that TSYS failed to do so; that TSYS knew about and ignored the problem for years; and that TSYS had the ability to fix the problem easily but chose not to. Ultimately Klems concluded that the VMPD fines incurred by EPS were caused by TSYS. The Arbitrator agrees.

As a result of the VMPD errors by TSYS, EPS incurred fines in the amount of \$149,875, of which Visa refunded \$18,000, leaving a net amount paid by EPS for VMPD fines of \$131,875. The Arbitrator awards EPS \$131,875 as reimbursement by TSYS of VMPD fines paid by EPS.

As discussed in Section IV, below, the Arbitrator concludes that the monetary limits on recovery set forth in Section 7.9 of the Agreement between the parties (Ex. 9) do not apply to the reimbursement by TSYS to EPS of VMPD fines. The Arbitrator is also unpersuaded by TSYS' argument that EPS was obligated under Section 7.6 to notify TSYS of its error within 60 days of when it was billed for the VMPD fines. This requirement applies only to failures by TSYS that are "known, or should have been known, to EPS." (Section 7.6) There is no basis for finding that EPS should have known that assessments appearing on their invoices as a "registration fee" were actually VMPD fines. In contrast, however, TSYS had actual notice that the way they mapped addresses caused VMPD problems - notice TSYS had for 10 years and ignored.

B. Billing Element Tables

The largest counterclaim asserted by EPS against TSYS involved TSYS' alleged failure to properly migrate Billing Element Tables (BETs) from the CardSystems platform to the TSYS platform. CardSystems used tables referred to as "Interchange Plus" or "IP" tables. Interchange charges are established by the card associations, Visa and MasterCard. The tables identify and specify how a merchant is to be charged for each variation of interchange charges, and are supposed to incorporate a surcharge determined by the ISO, too. The amount of the surcharge depends on the degree of risk associated with the transaction. Qualified transactions have no surcharge. Mid-qualified transactions (mid-qual) have some surcharge. Non-qualified (non-qual) transactions have a greater surcharge. TSYS uses tables similar to CardSystems' IP tables, but TSYS calls them Billing Element Tables.

Marshall was the representative of EPS providing the information in the CardSystems IP tables to TSYS for TSYS to use in building the BETs. Craig Truesdell was the representative of TSYS primarily responsible for this item. According to Marshall, EPS' was to provide Truesdell the existing IP tables from CardSystems. It was then Truesdell's task to accurately map the information over

from the CardSystems IP tables into the TSYS BETs. Truesdell represented to Marshall that Truesdell had done similar mapping over and creation of BETs for several other ISOs successfully. The process used by Marshall and Truesdell was that Truesdell provided Marshall spreadsheets for his review, showing the merchant and the rates at which mid-qual and non-qual transactions would be charged. To the extent there were any anomalies in the data, Truesdell would identify them and Marshall would go into the CardSystems platform and address them so all data was in order before it was mapped over from the CardSystems platform to the TSYS platform. Marshall testified that Truesdell did, in fact, create the BETs and that Truesdell represented the Billing Tables he created accurately reflected and included the mid-qual and non-qual rates as they existed in the CardSystems data.

Truesdell was the primary TSYS person involved in mapping the BETs over to the TSYS system. His absence from these proceedings is notable. TSYS presented no evidence disputing EPS' claim that the information was improperly mapped over by Truesdell. No spreadsheet or other document was provided by TSYS to demonstrate the accuracy or thoroughness of Truesdell's work. Without Truesdell, the testimony of Marshall that the responsibility for the inaccuracy of the BETs lies with Truesdell and TSYS stands substantially unrefuted and is accepted by the Arbitrator.

In June 2007, more than a year after the conversion, Maley was trying to determine why EPS' revenues were falling off. At that time he discovered Truesdell had failed to fully map over the mid-qual and non-qual surcharges. Maley's analysis and results are reflected in Ex. R-43. Maley began with April 2006 and went through each of the voluminous interchange categories, determining the volume of mid-qual and non-qual transactions processed. Then after making an appropriate reduction for mail order/telephone order (MOTO) merchants, Maley compared the total revenues that should have been received by EPS to the amounts actually received and showed the disparity for each month.

An example of this monthly analysis (for April 2006) appears on Ex. R-43, Bates EPS 1509 through 1513, showing a disparity of \$267,665.65 for that month alone.

The monthly disparities are summarized on the first page of Ex. R-43, Bates EPS 1507, demonstrating a total loss to EPS as a result of TSYS' failure to properly map over the mid-qual and non-qual surcharges to the BETs in the amount of \$2,671,463.57.

TSYS argued the errors made by Truesdell in converting the BETs from the CardSystems to the TSYS system were excused because EPS had the opportunity to review Truesdell's work and catch his mistakes. TSYS' argument is based on Section 7.6 of the parties' Agreement (Ex. 9) which states:

7.6 Errors. EPS agrees to check all output information produced by VITAL, including but not limited to, statements and interchange qualification levels to determine if such information is correct and will promptly report any errors discovered therein to VITAL. In no event shall VITAL be liable with respect to any loss, liability, cost, damage or expense caused by VITAL's failure to perform hereunder but not reported by EPS to VITAL within sixty (60) days of when such failure to perform is known, or should have been known, to EPS.

TSYS also had EPS sign "Verification Checklist" forms periodically. See for example, Ex. 122. The forms purported to have EPS approve the work TSYS had done during various stages of the conversion process. TSYS provided no evidence that the documentation provided along with such forms contained enough data to confirm or deny the accuracy of the converted tables, particularly since Truesdell was the purported expert in such matters as they related to the TSYS system, while EPS personnel were untrained in such matters.

Dorsey did, in fact, sign a verification form that listed, among other items, the BETs. However, such verification by Dorsey does not excuse Truesdell's initial failure to accurately map the BETs over to the TSYS system. The language of Section 7.6 imposes a duty on EPS to report only those errors of which EPS knew or should have known. No evidence was presented that Dorsey, or anyone

else at EPS, knew of Truesdell's mistakes until they were discovered by Maley in 2007. Nor is there any evidence EPS should have discovered Truesdell's mistakes. On the contrary, EPS hired TSYS due to its professed expertise in such matters. It is not reasonable to require the lay person to discover the expert's mistakes.

To the extent the language of Section 7.6 could be interpreted to obligate EPS to discover TSYS' mistakes, the section is invalid because it violates the implied covenant of good faith and fair dealing, and it is contrary to public policy. It violates the covenant of good faith and fair dealing implied in every contract under Arizona law because it seeks to deprive EPS of the very benefit EPS seeks under the contract by eliminating any assurances EPS would have that the conversion, including the transfer of the BETs, was done properly.

Section 7.6 also violates public policy as an impermissible attempt to limit TSYS' liability. Such limitations are permitted, but viewed with disfavor. Such limitations should not be upheld where, as here, the expert seeks to limit its liability by putting the onus on the customer to catch the expert's mistake by unilaterally inserting a provision in an agreement that was drafted solely by the expert, with no input from the customer.

The outcome urged by TSYS is particularly inappropriate where, as here, Dorsey signed the verification form not because he had carefully reviewed Truesdell's work (which he lacked the expertise to do) but because TSYS personnel made it clear to EPS that unless they signed the verification forms provided to them from time to time, the conversion process would come to a halt. Given the intense time constraints under which EPS was operating, Dorsey felt he had no option but to assume TSYS had done their job properly and sign the verification form. This same feeling was shared by other EPS' employees asked to sign verification forms. Dorsey's signature on a verification form does not excuse Truesdell's mistake. Furthermore, the Arbitrator notes that interpreting Section 7.6 to excuse TSYS's negligence in transferring the BETs would be

directly contrary to the indemnification provisions of Section 7.1 which expressly make TSYS liable to EPS for any negligent acts or omissions by TSYS.

To the extent TSYS has argued that Section 7.6 obligated EPS to notify TSYS of the problems with the BETs within 60 days of when Maley became aware of the problem, again the Arbitrator is unpersuaded. Maley began his investigation in June 2007. At that time, it was TSYS representative, Poole, who suggested Maley look at the BETs. From his comment, it is apparent Poole and, in turn, TSYS had at least inquiry notice that they should look into the tables. Had TSYS done so, presumably they would have discovered the errors in the tables that were mapped over and constructed by TSYS. TSYS cannot be heard to complain about their own failure to act. The evidence was undisputed that Maley began his investigation into the BETs in June 2007, and once Maley was able to identify the issue, EPS corrected the BETs by July 2007, thereby limiting the damage caused by TSYS' errors.

As discussed in Section IV, the Arbitrator concludes that the monetary limits on recovery set forth in Section 7.9 of the Agreement (Ex. 9) between the parties are invalid as violative of public policy.

Accordingly, the Arbitrator finds that TSYS breached its agreement to accurately map over the BETs and that such breach proximately caused EPS damages between April 2006 and June 2007 in the amount of \$2,671,463.57, for which EPS is entitled to be compensated.

C. Papa Gyros interchange

Papa Gyros is an EPS merchant that sells Greek fast food. An employee of Papa Gyros inadvertently keyed in the amount of a sale as \$958,510.21. (Ex. R-73) TSYS is responsible for authorization as part of its handling of the front end of such transactions. There was some testimony by TSYS that the overcharge was never authorized because the erroneous amount was submitted as part of the tip function. The Arbitrator finds more persuasive the testimony of EPS' risk manager, John Meinell, that the tip function should not have authorized more than

20% of the amount of the purchase (and certainly not \$900,000 for a gyro sandwich) and that any greater amounts should have required re-authorization. Other TSYS representatives testified that the error was not part of the tip function and they did not know how it was authorized. Poole indicated that how the transaction became authorized would be a question best answered by Nancy White, the other Client Operations Manager assigned by TSYS to handle EPS' account. TSYS chose not to present White's testimony. The Arbitrator finds that under no circumstances should TSYS have authorized this \$950,000 "fat fingered" transaction from a Greek fast food shop.

What happened to the transaction after TSYS' inappropriate authorization was subject to substantial dispute between the parties. TSYS contended that when the transaction reached a certain flag point in the system, EPS should have switched the flag to D, which would deactivate the merchant and would stop the flow of funds. EPS's risk manager Meinell testified that EPS did not switch the flag to D because that would have caused more problems than it solved, specifically it would have resulted in a transmittal error that would have to be worked and would have prevented the merchant from processing further transactions. Instead EPS allowed the transaction to flow past the flag and directly into a diverted funds account maintained by Merrick Bank. (Ex. 317) It was undisputed that the amount flowing past the flag and into the diverted funds account was \$940,902.57, not the full \$958,510.21. The real dispute is what happened to the \$17,607.64 difference between the amount of the original transaction and the amount that flowed into the diverted funds account.

The only evidence presented by TSYS was the testimony of Fisher that EPS put the funds into another EPS account and assessed them against the merchant. Fisher could not identify the account into which she believed EPS had deposited the \$17,607.64 and provided no other support for her assertions. EPS' representatives testified that the reason \$940,902.57 made it into the diverted funds account, is because interchange in the amount of \$17,607.64 had been

assessed by the card associations before the transaction reached the flag TSYS suggested switching to D. As Meinel indicated, switching or not switching the flag did not alter the amount of the transaction, so the deduction had occurred at a previous point in the process before reaching the flag. Meinel as EPS' risk manager, and Maley as EPS' chief operating officer confirmed that the \$17,607.74 did not flow into any other EPS account.

Based on the foregoing, the Arbitrator concludes that TSYS erred in authorizing the transaction and further erred in failing to stop the transaction before interchange was assessed against it. As a result, the Arbitrator determines that EPS is entitled to be reimbursed \$17,607.74 by TSYS for the interchange paid by EPS in connection with the Papa Gyros matter. For the reasons discussed in Section IV, the Arbitrator concludes that such reimbursement is not limited by the provisions of Section 7.9 of the Agreement (Ex. 9).

D. Toll free telephone number

The testimony presented during the hearing established that EPS had an interest in obtaining control over the toll free, 1-800 number used by EPS merchants to contact TSYS. Anderson acknowledged that control of the number would enable EPS to move its merchants if it decided to do so. Anderson also acknowledged that TSYS initially agreed to provide EPS with the requested number and control, but subsequently reneged on its commitment because it would be difficult to provide an "empty 800 number." Nonetheless, Anderson admitted that after this difficulty was realized, he and Harry Hasselman, TSYS' Executive Vice President, verbally committed to Dorsey that at whatever time EPS wanted an 800 number, whether it was to move EPS' merchants or for some other reason, TSYS would provide it. According to McCann, Anderson and Hasselman committed to making EPS the owner of the 1-800 number. The Arbitrator will enforce this commitment and hereby orders that TSYS provide EPS with immediate and continuous access to and ownership of the toll free 1-800 number that connects EPS' merchants to a processor.

E. Deceptive trade practices

Arizona governs deceptive trade practices through the Arizona Consumer Fraud Protection Act (the Act), which provides, in relevant part:

The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such a concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has been in fact misled, deceived or damaged thereby, is declared to be an unlawful practice.

Section 44-1522, A.R.S.

The Act applies to business entities such as TSYS and includes services within the definition of "merchandise." It applies to negotiating a contract. To recover under the Act, EPS must show TSYS made a false promise or misrepresentation in connection with the sale or advertisement of merchandise (including services), that TSYS intended to make the misrepresentation and EPS rely on it, that EPS did in fact rely on the misrepresentation to its injury, regardless of EPS' reasonableness in relying on it. Under the Act, EPS need not show TSYS intended to deceive, merely that TSYS intended to make the representations.

Based on the evidence presented, the Arbitrator finds that TSYS violated the Act in the following manners and instances:

1. Entering into the written agreement, but failing to provide a copy of Merrick Pricing (Ex. 3, Ex. A), which according to TSYS, contained the pricing for per transaction fees, Help Desk services, monthly merchant statement files, CDs, and other applicable charges.
2. Failing to disclose hidden residency fees required in order to receive Help Desk services or the hidden XML statement fee required in order to receive the Enhanced Merchant Statement Basic file.

3. Increasing the charges for CDs or imposing additional charges such as the Enhanced Merchant Basic file and the Merchant XML file through numerous amendments without notice to EPS.
4. Depriving EPS of its right to dispute charges for the monthly statement files, by refusing to provide the files unless EPS paid the full undisputed amount for such file.
5. Hiding the fees associated with Help Desk services in a lengthy, convoluted pricing schedule that TSYS representatives had difficulty interpreting.

As a result of these violations of the Act, the Arbitrator finds that EPS has suffered the following damages:

1. EPS was over billed by TSYS in the amount of \$172,261.12 for per transaction fees that were contained in a document incorporated into the written Agreement by reference, but not provided to EPS. EPS disputed all but \$24,465.15 which it paid under protest, thereby limiting EPS' damages to such \$24,465.15 for per transaction fees charged by TSYS.
2. The Help Desk charges billed to EPS included per call charges and residency fees. The per call charges were contained in a document incorporated into the written Agreement by reference, but not provided to EPS. The residency fees were hidden charges that were not disclosed to EPS before it entered into the Agreement with TSYS. Of the \$497,342.53 billed to EPS for Help Desk fees, EPS disputed all but \$ 32,436.20 paid under protest in March and May 2008, thereby limiting EPS' damages to such \$32,436.20 for Help Desk charges.
3. Between the Enhanced Merchant Statement Basic file and the XML Statement file, TSYS over billed EPS in the amount of \$127,014.50 and \$60,750, respectively. EPS was not provided with documents indicating the amounts they would be charged for these services. The XML Statement file is a hidden charge which, according to TSYS must be paid before the Enhanced Merchant Statement Basic file will be provided. Of the amounts

billed to EPS for the merchant statement files, EPS disputed all but \$ 42,884.75 paid under protest, thereby limiting EPS' damages to such \$42,884.75 for Merchant Statement file charges.

4. In connection with the CD data disks, TSYS sought to increase the charge for the disks without notice to EPS. EPS was over billed for CDs in the amount of \$30,595.10. EPS disputed this amount, thereby avoiding any damages as a result of the improper overcharge by TSYS.
5. The payments made by EPS under protest for transaction fees, Help Desk charges and merchant statement files were caused by TSYS' efforts to deprive EPS from using the agreed upon dispute resolution process, which deprivation also constitutes a deceptive practice.

IV. LIMITATIONS ON DAMAGES AWARDED TO EPS

TSYS argued that any award to EPS should be limited by the provisions of Section 7.9 of the Agreement, which provides that the liability of either party is limited in the aggregate to three times the average monthly billing over the previous 12 months, except amounts due under Section 3.1 (the section which requires payment for services).

Many of the amounts awarded to EPS are exempt from the limits of Section 7.9, as reflected in its express language. Other amounts awarded to EPS are exempt from the limits of Section 7.9 because 7.9 applies only to claims arising under the written Agreement and not to claims founded on a separate, independent basis, such as the Arizona Consumer Fraud Protection Act. The other amounts awarded to EPS are exempt from the limits of Section 7.9 as the provision violates sound public policies that limit the ability of a party to excuse its own misconduct.

By its language, the limit of Section 7.9 does not apply to amounts billed under 3.1. All of TSYS claims and EPS' dispute of those claims relate to amounts TSYS claims to be due to TSYS under Section 3.1 of the written Agreement. Therefore, the Arbitrator's award sustaining EPS' disputes of the amounts it was charged for per transaction costs, Help Desk charges, merchant

statement files, and CD data disk charges are expressly excluded from the limitations of Section 7.9.

By its terms, the limits set forth in Section 7.9 apply only to TSYS' liability for claims under the written Agreement. (Ex. 3, Section 7.9: "The liability of either party hereunder to the other ...shall be limited"). The VMPD fines did not arise under the written Agreement. They were assessed by Visa, a third party that was not a party to the written Agreement, for the failure of TSYS to comply with Visa's rules, not for breaching a provision of the written Agreement between TSYS and EPS. That this claim is not one arising under the contract is demonstrated by the fact that even if there was no written Agreement between EPS and TSYS, if TSYS caused EPS to have to pay fines levied by Visa, TSYS would still be liable to reimburse EPS for those fines. This is particularly true where it is fines, rather than a damage assessment that is involved. The fines are not imposed to compensate Visa, as there is no correlation between the amount of the fines levied and any damages suffered by Visa because TSYS failed to properly map over merchant addresses. Visa assesses the fines to encourage TSYS to modify its behavior and correct its errors. Since it is TSYS' behavior Visa seeks to modify, it would be counter-productive to limit the extent to which TSYS should reimburse EPS for fines TSYS caused.

Similar to the VMPD fines, the Papa Gyros interchange is an assessment by Visa that falls outside the written Agreement. Even in the absence of an agreement between the parties, since TSYS caused EPS to incur this interchange assessment from Visa, TSYS is obligated to reimburse TSYS. Since it is not a liability arising under the written Agreement, it is not subject to the limitations of Section 7.9, even if such limitations were valid.

As mentioned above, the express language of 7.9 confines its limitations to claims under the written Agreement. Therefore, to the extent TSYS' liability is founded on an independent basis, separate and apart from the written Agreement, the limits of Section 7.9 do not apply. The Arizona Consumer Fraud Protection

Act is one such basis. As discussed in Section III, E, above, independent of any liability TSYS has to EPS under the written Agreement, TSYS is liable for the following items and amounts under the Act for deceptive trade practices: (1) over billed per transaction fees, (2) over billed and hidden Help Desk charges, (3) over billed and hidden charges for Merchant Statement Basic files and XML Statement files, and (4) over billed charges for CD data disks. Therefore, even if Section 7.9 were valid, it would not apply to these categories of the award.

To the extent any of the amounts awarded are not exempt from the limits of Section 7.9 as discussed above, Section 7.9 should not be enforced because it violates public policy and is contrary to other provisions in the written Agreement. Exculpatory clauses, like Section 7.9, if enforced, enable a wrongdoer to avoid the consequences of their misdeeds and leave the party who suffers the injury or loss uncompensated. As a result, they are generally disfavored and often they are not enforced as they violate public policy. For example, to allow TSYS to take advantage of the exculpatory provisions of Section 7.9 in connection with TSYS' violations of the Act, would frustrate the purposes of the Act, which are to discourage the practices prohibited by the Act, such as those engaged in by TSYS.

✱ The Arbitrator concludes that EPS should not be left uncompensated for damages caused by TSYS and TSYS should not be shielded from liability based on an exculpatory clause that was drafted solely by TSYS, with no input from EPS. There is no indication that this liability limitation was ever discussed between the parties.

EPS undoubtedly suffered additional losses, including the loss of a substantial number of merchants, losses due to outgoing rejects, and losses due to TSYS billing EPS outside the Agreement. However, these losses could not be quantified and therefore are not reflected in this award.

Although the written Agreement specifies time periods within which EPS must provide TSYS with its notice of dispute if EPS wishes to withhold payment until the dispute is resolved, there is no limit on the ability of EPS to dispute

charges and there is no provision in the written Agreement that once EPS has paid for services, it is precluded from disputing those services.

V. AWARD

WHEREFORE, the Arbitrator's enters this Award as follows:

1. Refunds of amounts overbilled by TSYS and paid by EPS
 - a. Transaction fees
\$24,465.16 The Arbitrator awards EPS a refund for transaction fees paid under protest in the amount of \$24,465.16.
 - b. Help Desk services
\$32,436.20 The Arbitrator awards EPS a refund for the March and May 2008 bills paid under protest for Help Desk services in the amount of \$32,436.20.
 - c. Monthly Merchant Statement file fees
\$42,884.75 The Arbitrator awards EPS a refund for bills paid under protest for monthly merchant statement fees in the amount of \$42,884.75 plus such additional amounts paid by EPS between June 2008 and the date of this award, as established by affidavit.
\$4,767.00 Amount paid for merchant statement file in response to Goldwin demand letter (See Ex. R-14).
 - d. CD data disk charges
No refund is involved. EPS's dispute is sustained.
2. Reimbursement of fines and charges paid by EPS
 - a. VMPD
\$131,875.00 The Arbitrator orders TSYS to reimburse EPS for VMPD fines paid in the amount of \$131,875.00.
 - b. Papa Gyros Interchange
\$17,607.74

3. In addition, the Arbitrator awards damages to EPS for its counterclaims in connection with the Billing Element Tables in the amount of \$2,671,463.57.
4. The Arbitrator further orders TSYS to handle all future calls from EPS merchants as specified herein and to modify the charges on all invoices to reflect this award.
5. The Arbitrator orders TSYS to provide EPS with immediate and continuous ownership, control, and access to the toll free 1-800 number that connects EPS' merchants to a processor.
6. The Arbitrator awards EPS its costs incurred in connection with this matter in the amount of \$27,241.49.
7. TSYS shall bear all costs of the AAA and shall pay all of the Arbitrator's fees.
8. Neither party has requested attorneys' fees.

The administrative fees and expenses of the American Arbitration Association totaling \$16,750.00, and the compensation of the arbitrator totaling \$53,300.00, shall be borne entirely by TSYS. Therefore, TSYS shall reimburse EPS the additional sum of Thirty Eight Thousand Six Hundred Fifty Dollars and No Cents (\$38,650.00), representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by EPS, upon demonstration by that these incurred costs have been paid

This award shall be treated as a final judgment and may be enforced as provided by law.

DONE THIS 20th DAY OF JANUARY, 2009.


ROBERT J. CORCORAN

Robert J. Corcoran, Arbitrator